Karnofsky v MassMutual

My name is Mary Fuller. I am the sole owner of Disability Claims Consulting Services in Portland, Maine.

My area of specialty is disability insurance, specifically: contract analysis, claims practices and procedures, and underwriting. I have worked in the field of disability insurance for 17 years and as an Expert in Disability litigation for twelve years. I have been retained in this matter as an Expert in Disability claims. I have attached the CV outlining my training and experience as Exhibit 1.

Industry Standards

It is a matter of fundamental understanding in the disability insurance industry that in administering the claims of their insureds, disability carriers have the following obligations among others:

- To fully investigate the relevant and applicable facts of a claim.
- To fairly consider all information obtained, including that which tends to favor claim payment or continuation as well as that which tends to favor claim declination or termination;
- To consider the interests of its insureds at least equal to its own and to resolve indeterminable issues in their insured's favor;
- To promptly and accurately notify their insureds of significant information or applicable policy provisions which might adversely affect their claims;
- To promptly and timely pay benefits owed under the policy;
- To establish and maintain procedures for the purpose of guaranteeing compliance of these obligations;

- To know and understand the language and meaning of their insurance policies and to administer their claims accordingly;

- To know and understand the applicable laws of the controlling jurisdiction and to administer their insureds' claims accordingly;

- To be able to read, interpret and understand all of the pertinent medical information with sufficient clarity so as to be able to make a fair, objective, and thorough evaluation of their insureds' claims for disability benefits;

- Denial of a claim should never be based on speculation;

- Consultants should be objective in their assessment of facts and not attempt to bias the claims investigation process in any way;

- Documents relating to the company's policies or claims handling procedures should not be destroyed to avoid disclosure to its policyholders;

- To conduct a fair, thorough, and objective review.

I know these standards from my experience in the industry and as Expert. These standards are drawn from various industry organizations including; the International Claims Association of America, The National Association of Insurance Commissioners, policies and procedures manuals of leading insurance companies, and various state statutes pertaining to Fair Claims Practice Standard Regulations.

Generally accepted business practices within the insurance business industry require that claims professionals administer claims within the context of the various state laws, to conduct a fair, thorough, and objective review of all aspects of the claim in order to make a proper determination.

The claims process is expected to be conducted in a prompt manner, without requiring unnecessary information. In addition, claims examiners are expected to maintain proper documentation of the actions that occur within a claim. They are expected to inform the insured as to the policy provisions the status of their claim, and any issues that may be identified.

Pertinent Policy provisions

November 17, 1994 Connecticut Mutual Life Insurance Company issued Ms. Karnofsky policy number 8095282 in the amount of $ 4,500 a month with a 90-day elimination period and a benefit period to age 65. Her policy contained an Own Occupation rider; her occupation at time of application was Anesthesiologist. The Policy also contained an Automatic Additional Benefit Increase Rider of 5% of the initial Monthly benefit every year for five years, as of 2000 the benefit amount was increased to $5,625 per month. (POL 008, MM 3203) Connecticut Mutual Life Insurance Company merged with Massachusetts Mutual Life Insurance Company and MassMutual remained as the surviving company that has succeeded to all liabilities duties and rights of Connecticut Mutual. (MMPOL 3)

Definitions

Doctor is a licensed physician, other than the insured or Owner, parent, spouse, or child of the insured or Owner parent, spouse, or child of the insured or Owner acting within the scope of his/her license.

Doctors Care: The insured is receiving care by a doctor for a condition causing the insured's disability.

Occupation: The insured's regular profession(s) or business(es) at the start of Disability.

Pertinent Policy Provisions:

Total Disability Under the Own Occupation Rider states: The Insured is Totally Disabled if he/she cannot perform the main duties of his/her Occupation due to sickness or injury. The insured must be under a doctor's care.

Partial Disability states: The insured is partially disabled if he/she

- is suffering from a current Disability
- is working at his/her occupation
- has a loss of income
- is under a doctor's care and

- can show a Demonstrated Relationship between the Loss of income and the current Disability.

Pre-Disability income: The greater of: The average monthly income earned and received for the last 12 months before the start of disability; or the average Monthly income earned or received for the last 24 months before the start of Disability; or the Average monthly income earned and received for the highest consecutive 24 months during the 60 months prior to disability.

Partial Disability Benefits

We will pay a Partial Disability benefit if the Insured is Partially Disabled and during the Waiting Period:

- the Insured has been Partially Disabled and had a Loss of Income of at least 20% of Predisability Income.

or

- the Insured has been Totally Disabled for at least 30 days.

During the first 12 months of Disability, any monthly payment for Partial Disability will equal 50% of the Partial Disability Monthly Benefit shown in the Policy Specifications.

However, if we receive proof of Loss of Income of more than 50% of Pre-disability Income, the Insured may qualify for a larger benefit. The monthly benefit will be determined as follows:

- If the Insured's Loss of Income is between 50%and 75% of Pre-disability Income, We will pay the Partial Disability Monthly Benefit shown in the Policy Specifications by the ratio of Loss of Income to Pre-disability Income.
- If the Insured's Loss of Income exceeds 75% of Pre-disability Income, We will pay the Partial Disability Monthly Benefit shown in the Policy Specifications.

Beginning with the 13th month following the start of Disability, the monthly benefit will be determined as follows:

- If the Insured's Loss of Income is between 20% and 75% of Pre-disability Income, We will pay the Partial Disability Monthly Benefit shown in the Policy Specifications multiplied by the ratio of Loss of Income to Pre-disability Income.
- If the Insured's Loss of Income exceeds 75% of Pre-disability Income, We will pay the Partial Disability Monthly Benefit shown in the Policy Specifications.

Recovery Benefit

After a period of Disability payments, a Recovery Benefit will be paid provided the insured's Loss of Income is at least 20% of Pre-disability Income. The Recovery Benefit will be paid through the 6th month following the Insured's full recovery and return to his/her Occupation. The monthly payment will equal the Partial Disability Monthly Benefit shown in the Policy Specifications multiplied by the ratio of Loss of Income to Pre-disability Income.

After 6 months, We will periodically reevaluate the Demonstrated Relationship between the Insured's Loss of Income and the previous Disability. We will continue to make monthly payments as long as the Insured's Loss of Income is at least 20% of Pre-disability Income and there is a Demonstrated Relationship between the Insured's Loss of Income and the previous Disability. Monthly payments, however, will not exceed the Maximum Benefit Period for Partial Disability.

The Policy also provided indexing of Pre-disability Income after each 12 consecutive months of Disability as well as; Rehabilitation benefits for a program approved by the company, Survivor benefits, and Waiver of premium benefits.

Documents Reviewed; Policy File MMPol 001-27, Claim file MM1 –MM3232, Unfair Claims Settlement Practices Act, 2004 Multi State Market Conduct Examination of UnumProvident and resulting RSA, 2005 California Market Conduct Examination of UnumProvident and Resulting Decision and Order, O'Net occupational description of Anesthesiologist, and documents reviewed are outlined in Exhibit 2

Claim Summary Background

Dr. Karnofsky purchased her Own Occupation policy from Connecticut Mutual Life Insurance Company in November of 1994. Her occupation at time of issue was anesthesiologist. Dr. Karnofsky continued to pay premiums for the next 17 years, while also continuing to work as an anesthesiologist. In September of 2011 Dr. Karnofsky submitted a claim for disability resulting from injury sustained in a motor vehicle accident in 2007; she explained that she continued to work while seeking treatment for her neck injury, gradually reducing the time spent and duties performed, until March of 2010 when she stopped working as an anesthesiologist altogether.

Prior to her claim submission Connecticut Mutual Life Insurance Company had merged with Massachusetts Mutual Company resulting in the claim being administered by Massachusetts Mutual. Dr. Karnofsky's policy defines occupation to be the insured's regular profession(s) or business(es) at the start of Disability and defines total disability as the inability to perform the main duties of his/her Occupation due to sickness or injury. Massachusetts Mutual, however, refused to pay benefits prior to January of 2012, and only paid total disability benefits until June of 2012, despite undisputed medical evidence supporting a permanent inability to perform anesthesia as she had done prior to her disability. In addition, while Massachusetts Mutual has in my opinion improperly continued to administer the claim as a partial claim, it has repeatedly requested extensive financial documentation far beyond what is warranted under the policy even if she were partially disabled. This has caused extensive delays and excessive costs to Dr. Karnofsky, leaving her no alternative other than to file suit. Despite an insurers continuing duty to investigate MassMutual ceased its claim investigation including investigation of financial information submitted in December of 2013 in support of benefits owed from June 2012 forward and a vocational review initially ordered in November of 2013,not completed until May of 2014 and never acted upon.

Opinion

It is my opinion MassMutual failed to: fully investigate the relevant and applicable facts of the claim, fairly consider all information obtained, including that which tends to favor claim payment or continuation as well as that which tends to favor claim declination or termination; consider the interests of its insureds at least equal to its own; promptly and timely pay benefits owed under the policy; know and understand the language and meaning of their insurance policies; and conduct a fair, thorough, and objective review. The violation of those duties constitutes a failure to comply with the good of good faith and fair dealing.

The basis for this opinion is set forth below:

- **Failure to fully investigate the relevant and applicable facts of a claim**

MassMutual's policy defines occupation as the insured's regular profession(s) or business(es) at the start of Disability. On September 29 Dr. Karnofsky submitted a claim for disability related to injuries she incurred in an accident in 2007 that culminated over time with the need for surgery for cervical disc. Dr. Karnofsky explained she had tried numerous medications and treatment modalities prior to surgery including: Physical therapy; muscle relaxants; NSAIDs and sleeping pills; and had gradually cut back her work until she stopped altogether in 2010. At the time of submission of the claim she had undergone a disc replacement for herniated discs at C5-6, 6-7 which was unsuccessful, and therefore she was scheduled to undergo a fusion from C5-7.

Dr. Karnofsky described her occupation as an anesthesiologist for 18 years following completion of her residency program, 14 of which she was affiliated with Anesthesia Associates of Charleston. (MM 656) Dr. Karnofsky described the physical requirements of her occupation to include: constant bending, reaching, pulling, twisting, lifting, running; hand and arm strength; manual dexterity; the ability to assist wheeling patients into the OR and/or assisting with lifting patients. She explained she worked in various surgery centers doing anesthesia, pain management, and obstetrics on call. (MM 657)

Dr. Karnofsky also explained she is unable to look down for more than 5 minutes without severe pain in her neck and arms. Standing for 20 minutes causes back pain that radiates down both legs, the toes of her left foot are numb, she cannot write without having tingling and pain in her right arm, and she has decreased hand strength and a tremor.

She described as well needing pain pills, muscle relaxants and Anxiolytics[1] to get through the day and that she is not able to take them when working. She described an inability to concentrate or make decisions due to pain, lack of sleep, and her medications. Her diagnoses were: displacement of cervical intervertebral disc, and post laminectomy syndrome of cervical region. She had been treated by Dr. Fisher primary care, Dr. Faaberg anesthesiology, and Dr. Pacult neurosurgeon. (MM 656-7)

In addition to Dr. Karnofsky's claim form, MassMutual also received an attending physician statement (APS) from Dr. Poletti who reported Dr. Karnofsky was restricted from reaching over her shoulder, and could occasionally sit, stand, and walk. She was not able to use her upper extremities repetitively for tasks to: grasp, push, pull, and no fine manipulation with either hand, all tasks required in performing anesthesia. (MM 580)

The disability determination requires an in-depth understanding of the occupational, medical, and contractual aspect of the claim. The occupational investigation includes establishing the material and substantial duties (or in this case main duties) of the insured's occupation, including the physical and cognitive requirements necessary to perform them. The medical evaluation involves verification of the restrictions and limitations (R&Ls) an insured experiences as a result of their medical condition, including R&Ls resulting from treatment of same (such as side effects of medication). Upon verification of R&Ls, a vocational analysis must be done to evaluate the impact those restrictions and limitations have on the insured's ability to perform the main duties of the occupation.

Ms. Mykytiuk, claims examiner for MassMutual, did not request a medical review at that time to determine the reasonableness of the R&Ls set forth by Dr. Poletti, nor did she inquire as to the side effects of Dr. Karnofsky's medications. She did not ask whether her use of medication was a potential barrier to her working as an anesthesiologist. Despite the severity of Dr. Karnofsky's condition, MassMutual did not conduct a medical review to address the reasonableness of Dr. Karnofsky's R&Ls until December of 2011 (MM 580), and instead ordered a comprehensive business check and a field visit. Ms. Mykytiuk also failed to ask for a vocational assessment of

[1] Anxiolytics are a type of prescription medication used to treat symptoms of acute anxiety.

duties involved in the performance of anesthesia, including the physical and cognitive requirements necessary to perform those duties.

The comprehensive business check resulted in obtaining information regarding two businesses that Dr. Karnofsky had incorporated in 2009 and 2010 which were not disclosed on the initial claim form. MassMutual's investigation following receipt of information regarding LowCountry Laser and Charleston Pain Center focused on limiting and/or eliminating altogether the financial liability associated with Dr. Karnofsky's claim, and not on conducting a fair thorough investigation.

Mr. Barone, field representative for MassMutual, met with Dr. Karnofsky and learned she had worked 40 to 50 hours a week prior to her accident and had reduced her hours to 20 -30, until she was terminated without cause, although Dr. Karnofsky reported it was a result of her reduction in hours and operating room time. Dr. Karnofsky explained she had reduced her operating room days to one day a week, but continued to take calls at Roper and affiliated surgical centers. She explained as well she started to seek alternative fields of anesthesiology as she had difficulty standing on her feet for long periods. She was having pain in her neck, arms, and legs when standing over a patient and watching the monitor, and she had reached a point she felt she might be putting her patients at risk, and would have left anyway due to the lack of improvement in her condition.

Mr. Barone reported that Dr. Karnofsky had formed the LLC for Lowcountry in 2009 but did not perform any procedures until June of 2010, after her termination, and that the work at Lowcountry Laser involves laser-assisted lipolysis; body contouring, skin tightening and skin treatments. Two people assist during procedures, and she uses general regional and local anesthesia, depending on the procedure. Although Mr. Barone reported Dr. Karnofsky administered anesthesia at Lowcountry Laser, Dr. Karnofsky does not have malpractice coverage for anesthesia and, his report is contrary to other information contained in the file.

Dr. Karnofsky also had formed Charleston Pain Center in 2010 and continues to practice pain management, which consists of spinal injections; however she was doing very little in that area at the time of the meeting. Dr. Karnofsky also explained that she was undergoing a fusion in November (later moved to December) and that Dr. Poletti, her neurosurgeon whom she has

been seeing since March of 2010, has advised her not to return to anesthesia. She continues to take Hydrochlorothiazide[2], Lortab[3], Soma[4], Ambien[5], Methylphenidate[6], Percocet [7]as needed, Mobic[8], Ativan [9]and Wellbutrin[10]. (MM 2098-9)

The role of the field investigator is to not only observe the insured but to also obtain further clarification on issues of importance to the claims determination via a face to face interview, thus the integrity of the information obtained is critical to conduct a full, fair, and thorough review. Although Mr. Barone reported Dr. Karnofsky administered general anesthesia while working at Lowcountry Laser, Dr. Karnofsky does not have malpractice coverage for anesthesia and had indicated she was unable to do so as a result of her cervical fusion. Dr. Karnofskys work at Lowcountry Laser was unrelated to her pre disability occupation as an anesthesiologist.

Following the field visit, MassMutual did not conduct a vocational assessment to compare the main duties of Dr. Karnofsky's pre disability occupation as an anesthesiologist working in a hospital / surgery center based environment with the duties that Dr. Karnofsky was performing in her occupation at the Lowcountry Laser Center and Charleston Pain Center. MassMutual did not recommend such a vocational review until November of 2013 did not refer the file for a review until February and did not complete the review until May of 2014. The vocational review was performed by Nawrocki & Smith Financial consultants, not vocational experts as one would expect. The analysis provided was purely financial, it did not identify the material and substantial duties of Dr. Karnofskys occupation as an anesthesiologist or the physical requirements necessary to perform them, or comparison of those duties with the occupational duties of her current work. Although the report had been completed in May of 2014 MassMutual failed to produce the report until November of 2014 and then only did so at the request of Attorney

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[2] Hydrochlorothiazide treats fluid retention (edema) in people with congestive heart failure, cirrhosis of the liver, or kidney disorders.
[3] Lortab (acetaminophen and hydrocodone) is used to relieve moderate to severe pain.
[4] **Soma (carisoprodol)** is used treat injuries and other painful muscle conditions.
[5] Ambien (zolpidem) is a sedative, also called a hypnotic. It affects chemicals in your brain that may become unbalanced and cause sleep problems (insomnia)
[6] Methylphenidate is a central nervous system stimulant. It affects chemicals in the brain and nerves that contribute to hyperactivity and impulse control
[7] Percocet contains a combination of acetaminophen and oxycodone. Oxycodone is an opioid pain medication. An opioid is sometimes called a narcotic.
[8] Mobic - **Meloxicam** is a nonsteroidal anti-inflammatory drug (NSAID) with analgesic and fever reducer effects.
[9] **Ativan** is a benzodiazepine used to treat anxiety disorders or anxiety associated with depression.
[10] **Wellbutrin (bupropion)** is used to treat major depressive disorder and seasonal affective disorder.

Kefalos. The report indicated that Dr. Karnofsky had performed both anesthesia and pain management procedures while employed at Anesthesia Associates of Charleston and that she had a decrease in her overall production beginning in April of 2008 which continued. Following disability Dr. Karnofsky was not performing any anesthesia and her pain procedures decreased from 1, 073 pre-disability to 229 post disability. (MM32348)

In addition, although Ms. Mykytiuk had informed Dr. Karnofsky that a vocational specialist may contact her in order to obtain more detail as to the duties she performed prior to the onset of disability, and those duties that she may no longer be able to perform. It appears the only vocational intervention Mr. Fresa's November 29th phone call with Dr. Karnofsky, during which he asked for procedure codes. Dr. Karnofsky responded that she was assigned to a room to administer anesthesia, and that she had to administer anesthesia for whatever procedures were scheduled and she had no control over that; Mr. Fresa did not ask for further explanation and instead indicated he did not need any further information from her. (MM 2151)

Mr. Fresa's vocational involvement was cursory at best and inadequate in the context of an Own Occupation disability claim. Mr. Fresa failed to address the essential components of a full, fair, and thorough occupational review including: information regarding her malpractice coverage, hospital privileges, on call schedule; professional standards relative to working while impaired and/ or taking medications; and the physical /cognitive requirements necessary to perform the duties of anesthesiologist.

- **Failed to fairly consider all information obtained, including that which tends to favor claim payment or continuation as well as that which tends to favor claim declination or termination.**

Ms. Mykytiuk informed Dr. Karnofsky that the late notice of claim for disability as of 2007 may have prejudiced the company's ability to obtain the medical, occupational, and/or financial information necessary to evaluate past periods of disability.

Although information was not immediately available regarding Dr. Karnofsky's 2007 medical records, MassMutual did have the knowledge that Dr. Karnofsky had undergone a failed cervical disc replacement surgery in July of 2011, and was going to undergo a two-level cervical fusion

in November. Despite the severity of Dr. Karnofsky's medical condition and the lack of any medical review to dispute the restrictions and limitations set forth by Dr. Poletti, there is no indication in the file that Ms. Mykytiuk considered evaluating Dr. Karnofsky's current claim for total disability as of July 2011 while she gathered medical, occupational, and financial information regarding possible further benefits for the period of 2007 to 2011.

On October 14, Dr. Karnofsky sent a letter describing her reason for filing a late claim. She described symptoms immediately following her car accident including headache, soreness, and back pain. She explained as well she sought treatment with Doctors Pacult and Fischer, participated in physical therapy, and was prescribed steroids, anti-inflammatory medications, pain meds, a TENS unit, sleeping pills, acupuncture, traction, and injections. Her condition, however, only worsened.

She was diagnosed with herniated discs at c5-6 and 7 and an annular tear at L5- S1, and it was recommended she undergo disc replacement. She also reported she was examined by Dr. Faaber and had been found to be permanently partially impaired but that she kept trying to do as much as possible.

Dr. Karnofsky explained the pain altered not only her professional life but her day-to-day activities and relationships. Following surgery she had improvement in her symptoms; however the symptoms returned and she was scheduled to undergo a fusion. She also explained she just could not accept that she was disabled until her doctors told her to file for benefits and that she can never again practice anesthesia. (MM 546)

It is evident that Dr. Karnofsky had been highly motivated to continue working while also trying multiple treatment modalities in an attempt to find a solution to her chronic pain complaints. Dr. Karnofsky also sent an email and explained she did not have any pay stubs and that the financial information being requested could be found in the tax returns, which she was sending. She also explained she did not have production reports and that she only files one tax return under her SS number and there is nothing more to provide. (MM 544)

Following receipt of Dr. Karnofsky's explanation for late notice, MassMutual received extensive medical records from Southern Spine Institute (MM 509 – 539) for the period of 2010 -2011.

She had been referred there by Dr. Alan Tanenbaum, due to three years of symptoms related to her 2007 MVA. (MM 00536)

Records from Dr. Poletti were also included, noting among other things:

- Karnofsky is well known to me. I have known her for many years. She is an anesthesiologist in the Roper Health Care System and has been working at Roper for many, many years. She was involved in a motor vehicle accident in April of 2007.
- She has been seen by Dr. Pacult, has had multiple epidurals; and continues with low back pain, hip pain, pain radiating into her neck and arm on the right, and pain radiating into her buttocks, hip, and leg right greater, with a sensation of temperature change within the right arm and a sensation of dysesthesia into the right leg with temporary relief from right L-5 selective nerve root blocks as well as cervical injections.
- Saw Dr. Geer for non-operative pain management, sees Pacult and Cuddy. She occasionally takes some narcotic analgesics and has had difficulty working, especially doing activities such as general anesthesia to involve patient transfer or intubation secondary to the pain and weakness in her right arm.
- MRI studies demonstrate the presence of multilevel disc bulging, a right-sided paracentral disc herniation at the CS-6 level, to a lesser extent at the C6-7 level. In the lumbar spine there is generalized disc bulging worse at the L5-S 1 level. There is some slight measure of foraminal stenosis on the right.. Diagnosis: Disc disruption CS-6, LS-S 1.
- Her symptoms are consistent with cervical and lumbar radiculopathy, and she will require some type of surgical intervention, especially on her neck. I do believe that the C5-6 disc is most likely the source of her pain,
- An April 2011 MRI found confirm increased sequestration of the disc at the C6-7 level consistent with her clinical symptoms, she is a candidate to consider surgical intervention in her cervical spine. Based on the C6-7 disc herniation, he recommended limiting the surgery to C6-7 with a disc replacement. She has some limited forward flexion of her low back and restricted motion in her neck with rotation to the right.

The initial follow-up records indicated Dr. Karnofsky was doing well until August 31 when she began experiencing neck pain, right upper extremity numbness, and tingling radiating past her right elbow. She has taken Percocet, Lortab, and Lidoderm patch ...X-rays taken at the time indicate artificial disc replacement would at best be malposition, and it was recommend she undergo a two-level fusion, as there was settling and rotation of the inferior aspect of the cervical disc arthroplasty[11], contributing to her neck and shoulder pain.

Records from October included prescriptions for Valium[12], Percocet[13], Keflex [14]and Doxycycline[15], with neck and arm pain no improvement, possible worsening, she also has severe osteoporosis, therefore she may want to wait for surgery to maximize her bone quality. (MM 00513)

As of October MassMutual had objective medical evidence in support of Dr. Karnofsky's claim for total disability as of 2011 including MRI's treatment notes and surgery records. Yet, despite Dr. Karnofsky's obvious need for benefits, the file was not sent for a medical review until December 5th and the review was not completed until December 27th.

MassMutual's consulting physician, Dr. Parisi found among other things:

- Between the date of the motor vehicle accident and the claimant's cervical surgery, the claimant received extensive workup and treatment for her condition.
- A statement from Dr. Andrew Geer dated March 17, 2010 noted, "As result of her accident sustained a severe level of permanent impairment and her resulting permanent restrictions would make her incapable of performing her job as an anesthesiologist. I would further concur that her symptoms as result of this accident make her a potential candidate for cervical disc replacement or arthroplasty at C5-6, anterior lumbar interbody fusion at L5-S1." (emphasis added)

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[11] **Arthroplasty** (literally "[re-]forming of joint") is an orthopedic surgical procedure where the articular surface of a musculoskeletal joint is replaced, remodeled, or realigned by osteotomy or some other procedure.
[12] Valium is used to treat anxiety disorders, alcohol withdrawal symptoms, or muscle spasms.
13 Percocet contains a combination of acetaminophen and oxycodone. Oxycodone is an opioid pain medication. An opioid is sometimes called a narcotic.
[14] **Keflex (cephalexin)** is used to **treat** infections caused by bacteria, including respiratory infections and ear infections.
[15] **Doxycycline** is an antibiotic for treating bacterial infections.

- "The claimant has had several diagnostic radiological studies of her back and neck in 2007, 2008, 2010, and 2011... The file documents multiple epidural steroid injections in both her back and neck from 2007 forward."
- The office note dated October 12, 2011 reported continued evidence of anterior shifting of the artificial disc replacement at C6-7.
- According to a field visit completed on November 3, 2011, the claimant was scheduled for cervical fusion surgery on November 15, 2011.
- It is likely that the claimant had a period of total impairment around the time of her motor vehicle accident in April of 2007 as well as around the date of her previous surgery in July of 2011. Considering the postoperative problems with her total disc replacement and her second more recent surgery, it would not be unreasonable to extend that period to the current date.

It is evident from Dr. Parisi's medical review that Dr. Karnofsky suffered injuries in 2007 which, per MassMutual's own medical reviewer, would have resulted in a period of total disability in 2007. It is also evident from the medical review that she continued to experience ongoing symptoms of pain and sought treatment from several different physicians concerning her neck and back complaints, had been prescribed numerous medications and undergone multiple epidural steroid injections, he opined: It therefore would be reasonable to support partial impairment during that time frame. (Emphasis added) (MM 2143)

Although Ms. Mykytiuk had indicated that MassMutual may have been prejudiced by the late notice of the claim, there was no evidence MassMutual was unable to obtain medical records from 2007 forward which, Dr. Parisi opined, confirmed ongoing impairment. Although the medical review did not opine on the extent of impairment, Ms. Mykytiuk did not investigate further with her consulting physician, Dr. Parisi, or any of the treating physicians as to the possible length of time that Dr. Karnofsky may have been totally disabled in 2007. She also failed to investigate further Dr. Geer's report that Dr. Karnofsky had experienced a severe level of impairment as a result of her accident in 2007 and had permanent restrictions including: what the permanent restrictions were when they began, and how they impacted her ability to perform the duties of her occupation.

In addition to medical evidence in support of disability, MassMutual also received financial evidence in support of payment via her tax returns. Partial disability payment is determined by establishing the pre-disability Net income and evaluating the percentage of lost earnings following disability. The financial review of the 2004 through 2010 returns indicated that Dr. Karnofsky's taxable income had dropped from $165,517 in 2004 to $123,769 in 2008 the year following her accident, in 2009 it had dropped to $80,411 and in 2010 it had dropped to $46, 895. Dr. Karnofsky's gross wages had also declined from $178, 552 in 2004 to $142,000 in 2008, $102,345 in 2009 and $52, 414 in 2010 when she stopped work altogether. (MM 2149 - 2150)

The partial disability provision states:

We will pay a partial disability if the insured is partially disabled and during the waiting period (in this case 90 days). The insured has been partially disabled and has a loss of at least 20% of pre-disability income, or the insured has been totally disabled for at least 30 days.

During the first 12 months of Disability, any monthly payment for partial disability will equal 50% of the Partial Disability Monthly benefit shown in the policy specifications.

The Partial provision also states: If we receive proof of loss of income of more than 50% of pre-disability income the insured may qualify for a larger benefit. In the event the financial records showed a greater than 50%, loss the company could adjust the benefit amount.

Despite medical and financial information in support of partial disability as of 2007, rather than issue a 50% payment with a reservation of rights while it continued its investigation, MassMutual did not issue payment until January 30 and appears to have done so only as a result of Dr. Karnofsky's complaint about MassMutual's investigation. Benefits were issued for total disability as of July 2011 with a reservation of rights.

Reservation of rights is generally issued when there are questions still to be resolved as to impairment. There was no question as to impairment as Dr. Parisis supported total disability following surgery. In addition, it is unclear why MassMutual chose the start date of disability to be July of 2011, as Dr. Parisi had opined that there was impairment as early as 2007, as

evidenced by the type /extent of treatment she had received during that time period (MM 2143) and, Dr. Karnofsky had ceased performing all anesthesia as of March of 2010.

MassMutual's decision to pay under ROR and to only pay benefits as of July 2011 places the financial interest of the company above that of its insured. MassMutual' s claim investigation focused on eliminating and/or reducing the financial exposure associated with Dr. Karnofsky's claim and continued to do so to this day.

MassMutual paid Dr. Karnofsky two months of disability and then stopped payments, with no change in her medical or work status, and since that time has continued to demand unnecessary financial information regarding her work at Lowcountry Laser and Charleston Pain.

MassMutual's insistence on financial information not only causes undue delay, it is not appropriate in the context of an Own Occupation policy. Dr. Karnofsky was no longer working in her occupation as an anesthesiologist, and therefore income from any other work is not pertinent to eligibility under the policy.

Failure to promptly pay benefits due under the policy.

Following payment of total disability benefits for the period of July 2011 to December 2011, MassMutual continued to request additional medical financial and occupational information for the period of 2007 to 2010 and beyond without issuing any further payments. It was reasonable to seek financial information for purposes of evaluating partial disability from 2007 to June of 2010 when Dr. Karnofsky was continuing to work in her occupation in a modified capacity. It was not, however, proper to insist on financial information after she stopped working as an anesthesiologist, as income from her new occupation is not pertinent in the context of an Own Occupation policy. As noted previously, MassMutual had evidence of ongoing total disability from anesthesia following its initial payment and yet MassMutual continues to withhold payments.

In March, Dr. Karnofsky requested a new examiner, and in April she filed a complaint with the Insurance Department regarding MassMutual's handling, and still no benefits were paid.

MassMutual continued to receive certification of disability from Dr. Poletti, with permanent restrictions as of April 2010 of no overhead lifting, pushing, or pulling and alternate sitting, standing, and walking. Dr. Karnofsky also continued to take Percocet and Valium for her ongoing pain. Additional medical records were received including the 2010 IME performed by Dr. Pritchard related to the Dr. Karnofsky's accident and resulting injury.

MassMutual also received CPT code data that was submitted to Mr. Fresa for review on April 23. Mr. Fresca reported the production data was limited and encompasses only 17 days of billing. Dr. Karnofsky's billings included radiology and surgery / nervous system and evaluation and management; she saw 61 patients and billed 121 procedures, seeing an average of four patients a day and about 7 procedures a day. He indicated that more detailed information was needed, but due to her termination it may not be possible to obtain such a report. (MM 1400-1401, 2139 -40) Mr. Fresca identified the categories of procedures that Dr. Karnofsky performed during that 17-day period. He did not, however provide a general description of the duties of an anesthesiologist and the physical requirements necessary to perform those procedures as a part of his analysis. Nor did he explain the interrelationship of the procedures (if any), despite the importance of that information in determining eligibility for ongoing benefits.

MassMutual also received updated medical records and certification of impairment in March. The file was not sent for a medical review until April 25, and the review was not completed until May 1. Dr. Parisi noted that Dr. Karnofsky's surgery took place in December and that most likely she had not yet reached MMI. He opined R&Ls concerning the use of her neck are reasonable; the specific level of impairment, however, is unclear. He concurred with Dr. Poletti's restrictions relative to overhead lifting, pushing, pulling, and alternate sitting, standing, and walking. (MM 1343) He noted as well some improvement as reported in Dr. Pacult's February treatment notes, and, that Dr. Karnofsky is continuing to use a bone growth stimulator and will need x-rays in the future to document proper fusion. The prognosis for recovery from the fusion was for slow improvement with time; MMI most likely at the one-year mark.

Maximum medical improvement generally relates to the end point of the recovery process. Maximum recovery does not, however, automatically translate to full recovery in functional ability. Dr. Pacult did not specify whether Dr. Karnofsky's functional limitations would change

at the point he anticipated she would reach MMI. Dr. Karnofsky's limitations were related to solid healing of the two level cervical fusions. Solid healing of the fusion does not automatically equate to a change in ability to maintain the postural positions necessary for the performance of anesthesia, yet MassMutual never addressed this in its review.

Although Dr. Parisi had opined that Dr. Poletti's restrictions were reasonable, upon review of video surveillance conducted over three days he determined Dr. Karnofsky's activities were inconsistent with severe cervical impairment. Dr. Karnofsky was seen moving freely and quickly without signs of impairment. Dr. Parisi noted that he had reviewed the surveillance report as well as significant portions of the video. He did not define, however, how much of the 3 ½ hours of video he observed versus what he read. Furthermore, Dr. Parisi failed to elaborate further as to how Dr. Karnofsky's activities were inconsistent with the R &L's identified by Dr. Poletti.

Dr. Karnofsky's claim was related to limited range of motion in her neck and back as well as weakness in her hands, and pain when in positions necessary for the performance of anesthesia, none of which is visible or measurable through surveillance. There is no indication that the activities captured on video were consistent with the functional requirements necessary for the performance of anesthesia. The usual and customary manner for assessing functional ability is to obtain a Functional Capacity Examination, including evaluation of an insured's functional ability while performing tasks similar to those required in the occupation. Dr. Parisi did not recommend an FCE; he did, however, indicate he would call Dr. Poletti regarding current disability and Dr. Pacult regarding the regarding restrictions and limitations for the preoperative period.

Dr. Parisi reported Dr. Poletti asked that his questions be submit in writing, and on May 31 a letter was sent asking: whether Dr. Karnofsky could do overhead work at all; whether the overhead and push/pull restrictions were permanent; whether alternate sitting, standing and walking is still required; and, if so, how long she can perform these activities in any given day. (MM 2131) Although Dr. Parisi had identified concerns relative to Dr. Karnofsky's activity level as seen on video, he did not ask Dr. Poletti whether her ability to move about as he had observed was inconsistent with his stated restrictions and limitations. Nor did he ask that Dr. Poletti review the surveillance to determine whether it was inconsistent with his stated restrictions and limitations, as is the usual custom and practice.

Dr. Poletti responded: repetitive forward flexion in someone with cervical kyphosis and segment disc herniation is such that it would likely put pressure against that level leading to breakdown at her already worn out c5-6; she has neurological deficit tricep weakness; dysesthesia into her hand; and limited ROM in her neck. It would not be safe to intubate or independently mask patients. She has an element of weakness in her hand that is permanent, and she is not able to return to work as a practicing anesthesiologist.

Dr. Parisi also noted; Dr. Poletti's statements are not unreasonable. It would be reasonable to avoid repetitive forward flexion of the neck, but the amount of repetitive forward flexion required by an anesthesiologist is not clear. Dr. Parisi continued to support impairment, and suggested a more detailed physical examination. He also stated; obtaining an understanding of the similarities of her previous anesthesiologist and her current as a pain management physician would be helpful (MM 2128-9)

Although Dr. Paris's recommendations were pertinent to understanding eligibility for benefits, MassMutual did not request an IME or FCE, and did not obtain a comparative analysis of Dr. Karnofsky's pre- and post-disability occupational duties. Although the claim file is supposed to contain all information pertinent to the claim, there is no documentation in the file as to why MassMutual chose to disregard Dr. Paris's well-founded recommendations to obtain further medical and vocational information. MassMutuals failure to obtain this information is further evidence of its unfair and incomplete claim investigation.

Dr. Parisi opined: As to the IME by Dr. Pritchart related to the pre-operative period between 2007 and 2011, the document provided little information regarding function and R&Ls. In the context of a disparity of opinion between in-house/consulting physicians and treating/consulting physicians of the insured, the usual and customary practice in the industry is to contact the treating physician either via a peer to peer call or detailed letter outlining the areas of disparity and if not resolved to obtain an IME or paper file review. Dr. Parisi did not attempt to contact Dr. Pritchard by phone or by letter for further clarification, and instead maintained that the R&Ls from his prior review remain unchanged.

Dr. Parisi also indicated he would speak with Dr. Pacult regarding the extent of Dr. Karnofsky's impairment as of 2010. There is no indication in the file, however, that he contacted Dr. Pacult to

establish whether it was reasonable to accept liability for total disability as of March 2010, nor is there any explanation for why this did not occur. Despite a recognition that Dr. Karnofsky was impaired as of 2007, there were no further attempts to obtain medical information from physicians Dr. Karnofsky had consulted during that time, including Dr. Geer, Dr. Fisher, or Dr. Faaberg, to determine the extent of impairment from 2007 to 2010.

In addition to the medical review in support of impairment, Dr. Karnofsky wrote to MassMutual in April explaining that after the accident in 2007 she had given up days of work, late days, night call and weekends because of pain, procedures, appointments, or her need for medication, and that many days she left early, all of which resulted in a reduction in income. She asked again that MassMutual pay the back benefits due. (MM 1388 -9)

MassMutual had undisputed medical evidence in support of continued total inability to perform anesthesia, yet continued to insist on financial information related to Dr. Karnofsky's involvement in the Lowcountry Laserworks and Charleston Pain Center, meanwhile refusing to pay benefits. Dr. Karnofsky's occupation at time of claim was that of an Anesthesiologist, income that she receives through Lowcountry Laserworks and Charleston Pain Center is not pertinent to her eligibility for benefits under her Own Occupation policy. Dr. Karnofsky had to retain an attorney, however, in an effort to obtain the benefits due. MassMutual did not pay total disability benefits until January of 2012; rather than continue to pay benefits with a reservation of rights, MassMutual denied further benefits as of June of 2012 and refused to pay further benefits for another year. Following payment in July of 2013, MassMutual has continued to withhold payments and insisting on financial information that is not pertinent to the claim.

- **Know and understand the language and meaning of their insurance policies and to administer their claims accordingly.**

Dr. Karnofsky's policy defines Occupation as: The insured's regular profession(s) or business(es) at the start of Disability.

Total Disability under the Own Occupation Rider states: The Insured is Totally Disabled if he/she cannot perform the main duties of his/her Occupation due to sickness or injury. The insured must be under a doctor's care.

Medical reviews acknowledge that Dr. Karnofsky's initial impairment began in 2007 following the MVA; her occupation at the time of her injury was anesthesiologist. She had been working as an anesthesiologist for 18 years following completion of her residency, 14 of which were with Anesthesia Associates of Charleston. In 2011 when Dr. Karnofsky submitted her claim, she had been working in a modified capacity since 2007, and was ultimately terminated in 2010 due to her inability to meet the demands of employment as an anesthesiologist.

During the course of the claim, Dr. Karnofsky through her attorney submitted vocational evaluations performed by Ms. Hutchinson from March of 2010 and February of 2012. Both evaluations found that Dr. Karnofsky's restrictions would preclude her ability to work as an anesthesiologist. Dr. Karnofsky's attorney also submitted an IME by Dr. Faaberg which supported an inability to work beyond a sedentary capacity, and reported that the contortions, bending forward, stooping, and wearing lead gowns for her interventional work has significantly impacted her ability to generate the income levels prior to the accident. (MM 1305)

In addition to the vocational analysis and medical reviews in support of impairment MassMutual also received a copy of Dr. Karnovsky's malpractice coverage from 2010, which indicated that her professional liability coverage was limited to pain management she had no coverage for anesthesia.

In May of 2012, Mr. Barone conducted a second field visit, this time in the presence of her attorney. Dr. Karnofsky explained she has constant cervical and low back pain radiating to her right leg has pain with bending at the waist, is unable to lift more than 10 pounds and is unable to sit or stand more than an hour. Dr. Karnofsky also explained that as an anesthesiologist she spent 2/3 of her time on her feet, with little time for breaks and rest; she currently works at a much slower pace and she is under a lot less pressure. She does not perform any anesthesia, she only gives oral sedation or uses Lidocaine injections. (MM 2037) It is evident from the field visit that Dr. Karnofsky was working in a new occupation.

Following the field visit, MassMutual was also provided extensive financial and occupational information related to Dr. Karnofsky's income and procedures performed at Lowcountry Laserworks, vocational reports from Ms. Hutchinson, financial loss statements from Mr. Wood, and billing and management documents from TriCoastal Billing. MassMutual still insisted she

provide further information regarding P&Ls from Lowcountry Laserworks, and pay stubs and K-1's from Anesthesia Associates of Charleston.

Dr. Karnofsky was totally disabled and not working in her occupation as an anesthesiologist, as noted previously, income from her new occupation is not relevant. The same is true as to the financial information being requested relative to Anesthesia Associates. Eligibility for total disability is premised upon an inability to perform occupational duties, pay stubs and K-1's do not provide information regarding an insured's duties and are only pertinent in the context of a partial disability when a loss of at least 20 % is required for payment.

Although Dr. Karnofsky described the manner in which her neck and back pain impacted her ability to perform anesthesia, following the field visit MassMutual did not send the file for a vocational review to determine the physical requirements necessary to perform anesthesia, including the physical demands related to other interventional work or compare Dr. Karnofsky's current work at the Lowcountry Laserworks and Charleston Pain Center with the duties of an anesthesiologist.

In September 2012, Dr. Poletti (AP) explained Dr. Karnofsky has restricted range of motion in all planes in her neck, and has continued presence of disc protrusion and herniation at the C5-6 as well as ankyloses at c-6-7 causing increased pressure at c5-6. She has pain radiating into her arms, and atrophy, weakness, and dyesthesia into her hands, with loss of fine motor coordination of her hands consistent with cervical spondylitic radiculopathy, and possibly early myelopathy. It impacts her ability to do pain management, utilize a needle, intubate patients, and work in the capacity that would be required of an anesthesiologist. (MM 1074- 1075)

The file was referred to Mr. Miles, chief claim consultant for MassMutual. Mr. Miles opined at present we have accepted July 12 as the commencement date of total disability and have provided benefits through March of 2012 under ROR. We have requested documentation to determine eligibility during April 2007 and July 2011 and from March 2012 to the present, however the information remains outstanding. Based on the information in the file, the insured does not satisfy the eligibility requirements under her Own Occupation Rider and the financial information necessary to evaluate partial disability is outstanding. He recommended the claim be closed and (MM 1078) six days later MassMutual informed Dr. Karnofsky of the denial.

On September 18 Ms. Mykytiuk informed Dr. Karnofsky's attorney of the denial, and in doing so explained she had relied on information obtained in the production reports from Anesthesia Associates of Charleston, P A. from April 2006 through March 2007 which revealed the twelve (12) months immediately prior to April 2007, seventy-three percent (73%) of patients Karnofsky's patients were treated for pain management services and billed under the Current Procedural Terminology (CPT) codes 62310 and 62311. She stated; it is our understanding that a significant portion of the main duties performed by Dr. Karnofsky in her Occupation prior to the onset of her reported disability was related to pain management.

Production reports from Anesthesia Associates of Charleston from April 2007 to March 2010 and TriCoastal Healthcare Billing and Management for the period of March 2010 through March 2012, showed during both her claimed Partial Disability period of April 10, 2007 through April 14, 2010, and her claimed Total Disability period from April 15, 2010 through March 2012, she continued to bill for pain management services throughout this time. (MM2022) She denied benefits for total disability and provided the definition of partial disability and requested further financial information.

MassMutual's determination that Dr. Karnofsky was partially disabled due to her ability to continue to perform pain management procedures is contrary to the policy language. Determination of partial disability is based on the insured suffering a disability <u>while working in his or her occupation</u> (emphasis added) and, experiencing a loss of income related to the disability, and, is under a physician's care. (MM 2029)

Although there is evidence that Dr. Karnofsky performed pain management procedures in her occupation as an anesthesiologist, there is no vocational information supporting the determination that prior to 2010 Dr. Karnofsky's occupation was that of a pain management specialist. Dr. Karnofsky was employed as an anesthesiologist, she had anesthesia privileges, she performed surgical Anesthesia, was on anesthesia call and was insured as an anesthesiologist; as a part of her work as an anesthesiologist she also performed pain management procedures.

MassMutual's entire claims analysis focused on the duties Dr. Karnofsky performed without ever conducting an analysis of the occupation of anesthesiologist.

The O'Net is an Occupational analysis tool available on the internet which is utilized by many insurers in evaluating occupations. This tool has been available for a number of years and is generally preferred over the Dictionary of Occupational Titles as it is more current and provides more in-depth information regarding the various occupations.

O'Net's description of anesthesiologist states:

29-1061.00 - Anesthesiologists

Physicians who administer anesthetics prior to, during, or after surgery or other medical procedures.

Sample of reported job titles: Anesthesia Associate, Anesthesia Director, Anesthesia Resident, Anesthesiologist, Attending Anesthesiologist, Medical Doctor (MD), Obstetrical Anesthesiologist, Physician Anesthesiologist, Staff Anesthesiologist, Staff Anesthetist

Tasks include Tasks

- Monitor patient before, during, and after anesthesia and counteract adverse reactions or complications.
- Record type and amount of anesthesia and patient condition throughout procedure.
- Provide and maintain life support and airway management and help prepare patients for emergency surgery.
- Administer anesthetic or sedation during medical procedures, using local, intravenous, spinal, or caudal methods.
- Examine patient, obtain medical history, and use diagnostic tests to determine risk during surgical, obstetrical, and other medical procedures.
- Position patient on operating table to maximize patient comfort and surgical accessibility.

- Coordinate administration of anesthetics with surgeons during operation.
- Decide when patients have recovered or stabilized enough to be sent to another room or ward or to be sent home following outpatient surgery.
- Confer with other medical professionals to determine type and method of anesthetic or sedation to render patient insensible to pain.
- Order laboratory tests, x-rays, and other diagnostic procedures.
- Tools & Technology
- **Tools** used in this occupation:

Arterial line catheters — Intra-arterial catheters; Swan Ganz artery catheters

Cardiac output CO monitoring units or accessories — Heart rate monitors; Invasive hemodynamic pressure monitors

Electronic stethoscopes or accessories — Precordial stethoscopes; Pretracheal stethoscopes

Endotracheal or tracheotomy sets — Tracheostomy sets

Gas anesthesia apparatus — Anesthesia gas concentration monitors; Anesthesia monitors; Digital anesthesia machines; Gas anesthesia administration machines

In addition, Dr. Karnofsky's attorney had provided an employability evaluation by Ms. Hutchinson dated January 9, 2012 which contained the DOT description of Anesthesiologist noted below:

ANESTHESIOLOGIST (070.101-010):

"Administers anesthetics to render patients insensible to pain during surgical, obstetrical, and other medical procedures: Examines patient to determine degree of surgical risk, and type of anesthetic and sedation to administer, and discusses findings with medical

practitioner concerned with case. Positions patient on operating table and administers local, intravenous, spinal, caudal, or other anesthetic according to prescribed medical standards. Institutes remedial measures to address adverse reactions or complications. Records type and amount of anesthetic and sedation administered and condition of patient before, during, and after anesthesia. May instruct medical students and other personnel in characteristics and methods of administering various types of anesthetics, signs and symptoms of reactions and complications, and emergency measures to employ."

She noted: "Dr. Karnofsky's past work experience is consistent with these definitions."

MassMutual never asked Mr. Fresca to address the impact Dr. Karnofsky's restrictions and limitations would have on her ability to perform her duties as an anesthesiologist despite its obvious importance to the determination of eligibility for benefits.

Dr. Karnofsky was employed as an anesthesiologist until April of 2010, following her cessation of work in April of 2010; she has never resumed this role consistent with Dr. Poletti's recommendation that she not return to anesthesia.

Dr. Poletti stated:

> "Repetitive forward flexion in someone with cervical kyphosis and segment disc herniation is such that it would likely put pressure against that level leading to breakdown at her already worn out c5-6, she has neurological deficit tricep weakness and dysesthesia[16] into her hand and limited ROM in her neck, it would not be safe to intubate or independently mask patients, she has an element of weakness in her hand which is permanent and she is not able to return to work as a practicing anesthesiologist." (MM 1090) (emphasis added)

MassMutual's determination that Dr. Karnofsky is partially disabled, despite the fact that she is no longer working in her occupation as an anesthesiologist and is medically unable to do so, renders the definition of Own Occupation Policy under the policy meaningless.

- **MassMutual failed to consider the interest of its insured equal to its own.**

[16] **Dysesthesia** (dysaesthesia) comes from the Greek word "dys", meaning "not-normal" and "aesthesis", which means "sensation" (abnormal sensation).

In December of 2012, following denial of total disability and closure of the claim, Attorney Kefalos submitted income and procedure information from 2004 to 2010. Records clearly show that Dr. Karnofsky's billings for both anesthesia and blocks decreased following her accident in 2007 consistent with her reports that she had modified her duties while seeking treatment to resolve her chronic pain. A review of that information reflects that Dr. Karnofsky's billings for blocks for the three years prior to disability were $ 373,864, her Anesthesia billings $340,963. Billings from 2007 to 2009 following her injury were $298,417 for blocks and $269, 619 for Anesthesia, her drop in procedures consistent with her reports of modification of her duties and her hours.

MassMutual reopened the claim. It did so, however, without issuing any benefits, even with a reservation of rights, and continued to insist on further financial documentation despite Mr. Kefalos' repeated requests for an explanation as to why information from her new occupation was relevant, (MM 822) and undisputed medical evidence supporting the inability to perform anesthesia. MassMutual continued to insist on further information pertaining to Lowcountry Laser Works and Charleston Pain Center, and focused its investigation on establishing partial disability and not on conducting a fair, thorough, and objective investigation of eligibility for total disability. Consistent with its actions prior to the denial of the claim, MassMutual did not conduct a fair, thorough, and objective evaluation of Dr. Karnofsky's predisability occupation. Nor did they obtain an IME or FCE to establish the reasonableness of her restrictions and limitations, contrary to its contractual obligation to do so as well as industry practice.

Mr. Kefalos submitted financial information from Anesthesia Associates in March, including schedule Ks from 2000-2009, pay stubs from March 2007 to April 2010, as well as production data. (MM 962)-76) He provided a response to questions MassMutual had relative to the production information that had been produced. Mr. Kefalos explained that the assignment sheets he had provided were from Anesthesia Associates and that the formulas regarding units worked represented the actual credit Dr. Karnofsky was entitled to based on the nature of the job she performed. Ghost units represented the difference between the guaranteed credits and the amount Dr. Karnofsky might have fallen short of the guarantee. He explained as well that following the accident Dr. Karnofsky no longer worked weekends and that income reported after April 2010 was for work performed prior to that date.

In May, Mr. Kefalos provided P&L's for LowCountry Laserworks from January 2010 to March 2013, and was attempting to get records regarding Charleston Pain Care as well as bank statements. He also had submitted an APS from Dr. Poletti dated November 2011 with the permanent restrictions of no lifting, reaching, pushing, pulling, and alternating sitting and standing.

In addition to the financial information provided, MassMutual ordered a pharmacy search that found 14 pages of prescriptions that Dr. Karnofsky had obtained for her ongoing chronic pain. Although many of the prescribed medications have known cognitive as well as physical side effects, including potential for addiction and cognitive impairment, the records were not sent for a medical review or vocational review to determine what if any impact the use of such medications would have on Dr. Karnofsky's employability as an anesthesiologist working in a hospital and surgery center based environment.

MassMutual conducted a financial review on June 4th and determined, based on the information it had obtained, that if Dr. Karnofsky's losses were to be equally spread out across the months for those two years she would realize in excess of a 75% loss. A 75% loss entitles Dr Karnofsky to 100 % of the monthly benefit payment.

The file was forwarded for review to MassMutual's Chief Claim Consultant in June. Ms. Mykytiuk outlined the information obtained from Anesthesia Associates of Charleston and Tricoast Healthcare and Billing Management. She concluded that Dr. Karnofsky did not satisfy the definition of total disability, as she continued to bill for pain management services throughout the entire time. Ms. Mykytiuk recommended denial of the claim for both total and partial benefits. (MM 1991-2)

Three weeks after the recommendation to deny both total and partial benefits, a meeting was held between Mr. Miles (Claim Consultant), Ms. Mykytiuk, Mr. McDonough, and an individual whose name was blacked out. The determination was made to consider further surveillance and the merits of arranging an IME. There is nothing noted regarding payment of the claim, despite the unwarranted delay in reviewing the file, and clear evidence of ongoing impairment and financial loss that would equate to payment of a full benefit.

MassMutual's recommendations regarding surveillance and an IME reflect a continued focus on avoiding payment under the policy. As noted previously, surveillance does not provide objective evidence of impairment in the context of an own occupation in which the insured is suffering chronic pain and hand weakness.

As for the IME, MassMutual had not conducted a medical review in nearly a year, the last review having been July 2012. In that review, Dr. Parisi opined Dr. Poletti's opinion as to Dr. Karnofsky's restrictions and limitations were not unreasonable. Dr. Parisi recommended at that time the possibility of an IME as it relates to the degree of hand and tricep weakness, as well as her restriction in range of motion of her neck. He also noted it would be helpful to know the similarities and differences between her previous occupation as an anesthesiologist and her current activities as a pain management physician. (MM 1087) Dr. Parisi appears to recognize that hand strength and neck range of motion are essential to the performance of anesthesiologist. Dr. Parisi also recognized that Dr. Karnofsky was performing a different occupation than that of anesthesiologist, yet MassMutual failed to follow up on either of these recommendations, and instead focused purely on the financial aspects of the claim as a means to avoid payment of total disability.

On July 19, J. Lindsey conducted a financial review and determined that Dr. Karnofsky's income was as follows: 2004 $178,552; 2005 $174,069; 2006 $160, 276; 2007 $ 161,269; the year of injury, 2008 - $ 141.966; 2009-$ 102,412; 2010- $52,424. Dr. Karnofsky's total income dropped from $181,979 in 2007, to a negative income in 2009 and 2010. Her average monthly earnings dropped from $15,167 a month in 2007 to a negative $11,012 in 2010. (MM 1880)

On July 23, following the financial review reflecting a loss of earnings from 2008 and beyond, a second team meeting was held with Mr. Miles, Melissa McDonough, and Ms. Mykytiuk.

The decision was to inform Dr. Karnofsky that MassMutual was unable to consider disability benefits for any period of time prior to the retroactive time limit of one year and 90 days, as specified in the proof of Disability provision, and that the earliest retroactive date it would accept is June 12, 2010. (MM1982)

There is no explanation in the file as to why, after two years of investigating the claim, and upon receipt of medical and financial information in support of continuous impairment and income loss, MassMutual suddenly decided to apply the proof of loss provision of the policy. Once again, in the face of compelling information in support of payment, MassMutual placed its financial interests above those of its insured.

From the onset of the claim MassMutual's claim process was unduly burdensome and, in my opinion, in violation of the company's contractual obligations under the policy as evidenced by:

- It's failure to conduct a proper vocational analysis
- It's continued focus on partial disability in the absence of thorough review of Dr. Karnofsky's pre disability occupation.
- Its continuing requests for irrelevant financial information regarding current work in her new occupation
- It's use of the proof of Disability provision as a means of denying past benefits only after insisting for nearly two years that Dr. Karnofsky submit medical, financial and occupational data for that time period
- Its failure to obtain an FCE or IME.

On August 2, MassMutual informed Dr. Karnofsky of its determination to deny total disability as well as past due benefits, and in doing so stated among other things:

> "...As previously stated, Dr. Karnofsky's eligibility for Total Disability benefits is based on her inability to perform the main duties of her Occupation. The policy, in fact, refers to the plural "duties," not a single "duty." Based on the currently known facts, MassMutual believes that Dr. Karnofsky can still perform (and is performing) the majority of the "main duties" she was engaged in (and from which she was earning income on) prior to her alleged Disability onset date. Therefore, during these time periods which she has this functional capacity, she does not satisfy the eligibility requirements of Total Disability" (MM 1980)

In the context of disability claims it is commonly understood within the industry that ambiguities in the policy are to be construed in favor of the insured. Although Ms. Mykytiuk relies on the

policy language "main duties" as the basis of her denial, the policy does not provide any definition for main duties, thus providing guidance to its insureds or its claim staff. In the context of Own Occupation disability claims, insurers often define "material and substantial duties" or "main duties" as those duties which cannot reasonably be omitted for that occupation to remain intact. It is also understood that the inability to perform just one duty may result in total disability. Dr. Karnofsky's inability to administer anesthesia makes it impossible for her to be an anesthesiologist as the occupation is defined in the DOT, which is the only occupational description contained in the claim file other than Dr. Karnofsky's reports.

MassMutual's administration of Dr. Karnofsky's claim is similar to that which was found to be of concern in one of two separate Market Conduct Examination of one of the nation's leading disability insurers, which was the 2005 California Insurance Department Market Conduct Examination of one of the nation's leading disability insurers. Although the examination did not involve MassMutual, the examination and findings were a topic of legal bad faith seminars and industry fair claims training seminars, as they were felt to be pertinent standards for all insurers for conducting a fair, thorough, and objective review of disability claims.

The areas of concern identified by the examiners included among other things:

> "The Companies sold coverages for disabilities relating to medical specialties, but failed to provide coverage when the claimants could no longer perform their medical specialty. The companies accomplished this be performing a review of the claimants' medical billing records. If for example, the billing records indicated the majority of the time spent by a surgeon was in consultations, case presentations, or follow ups rather than actual surgery, then the surgeon was not considered disabled if he or she could no longer perform surgery." (CALIFORNIA MCE 15-16)

MassMutual has had undisputed medical evidence of impairment and financial evidence of a reduction in income and duties following her accident in 2007 and yet refused to pay back benefits. It also had certification from her treating physician, Dr. Poletti, that as of April of 2010 Dr. Karnofsky had permanent restrictions related to overhead lifting climbing, walking or sitting for long periods of time, no repetitive grasping pushing pulling or fine manipulation of both hands 00580. Following her surgeries Dr. Poletti also reported restricted range of motion in her

neck and hand weakness, which precluded her from being able to safely perform anesthesia and yet MassMutual continues to administer the claim as a partial disability. (MM 2127-2129)

Following the denial of past benefits, Mr. Kefalos contacted MassMutual in an attempt to obtain the past benefits due under the policy. MassMutual lawyer Ms. Joyce, however, insisted the company was within its rights to deny benefits, and MassMutual has continued to maintain its position regarding past due benefits. MassMutual's denial of benefits prior to June of 2010 places the interest of the company above that of its insured, as does its continued refusal to pay total disability beyond the limited time period following her surgery from July of 2011 to June of 2012.

Mr. Kefalos continued to submit information as requested including monthly profit and loss statements of: Lowcountry Laser for June 2012 to August 2013; billing records and charges for Charleston Pain Care for August 2012 to August 2013; as well as tax returns for 2009 -2011 for Lowcountry Laser and Charleston Pain Center. (MM 2121) October 3, 2013 Ms. Lindsay conducted a financial review noting there were monthly profit and loss statements from Lowcountry and that the annual losses reported on the tax returns had been recorded.

In January of 2014 Mr. Kefalos submitted 2012 Tax returns and Schedule Cs for both Charleston Pain Care and Lowcountry Laserworks. Lowcountry Laser showed a net loss of $88,327 for Lowcountry Laserworks and a profit of $13,809. Ms. Lindsey reported that the information provided, although not an accurate representation of the insured's net income (Loss), indicates she has well in excess of the requisite 75% loss. (MM 2120)

As noted throughout this report, Dr. Karnofsky's involvement in Lowcountry Laserworks and Charleston Pain Care occurred after she was no longer able to perform anesthesia and was no longer working as an anesthesiologist. Dr. Karnofsky's work at Lowcountry Laserworks and Charleston Pain Care Center did not involve performing duties of an anesthesiologist, therefore there was no basis for continued requests for financial information.

In addition, Mr. Kefalos also submitted updated medical information, including a June 2012 report from Dr. Faaberg certifying to continued disability as an anesthesiologist and limitations to sedentary work due to a worsening of her condition. In addition to Dr. Karnofsky's physical

complaints, Dr. Faaberg indicated Dr. Karnofsky should seek treatment with a psychiatrist for her depression, anxiety, and panic disorder. Records reflect ongoing treatment in 2012 -2013 including:

- August 14, 2012 cervical radiculopathy injection brachial neuritis
- January 9, 2013 injection for cervical and lumbar radiculopathy. Records from February of 2013 reflect Cervical radiculopathy at C7, repeat injections and symptoms of hand shakiness and left lateral leg pain. Her medications consisted of Meloxicam, Concerta, Clonazepam, Lidoderm patch, Wellbutrin, Lorazepam, and Lortab. (MM 1488 -9)
- April MRI which found; Mild non-compressive spondylosis. C3-4. Osteophytes with mild to moderate foraminal stenosis at C4-5. Mild non-compressive spondylosis CS-6. Osteophytes with severe right and moderate to severe left foraminal stenosis C6-7. Fusion with hardware and mild residual foraminal stenosis C7-T1. Mild noncompressive spondylosis. (MM 1514)
- May 30, 2013 Patient comes today complaining of positional weakness in her upper extremities, particularly hands. She says when she looks down, especially at the end of the day, she has some decreased fine movements in both hands. MRI unremarkable except for disc degeneration at C5-C6 without significant compression of the spinal cord... the area of the fusion at C6-7looks good. His plan was to compare the most recent MRI with her preoperative MRI and if no change, refer to neurologist for evaluation. Perimenopausal, Adult attention deficit disorder, Cervical disc disease, HTN
- August 21, 2013 injection for lumbosacral neuritis
- December 10, 30, 2013 injection for brachial neuritis, cervical radiculopathy (MM 1465)

Although medical records reflect ongoing treatment for pain, including injections and multiple prescriptions for her pain, depression, and anxiety, MassMutual failed to conduct any further medical review and instead focused entirely on obtaining financial information. MassMutual also insisted on documentation far beyond the scope of the contractual requirements, including among others an explanation as to Dr. Karnofsky's reasoning for maintaining a business that has produced such significant losses since inception.

Attorney Kefalos filed a complaint /suit on February 6, 2014 (MM 1943), he also replied to MassMutual's inquiries regarding Dr. Karnofsky's business and explained, "Dr. Karnofsky has been trying to begin a new business and believes can be profitable and support her and her family." He stated further, "Dr. Karnofsky has most of her life savings invested in the business, and has a five year lease and $50,000 in renovations; had she been receiving benefits she would be closer to hiring help and market properly, and it would likely have been profitable by now."

He explained as well the 43,000 miles in business travel are related to networking, marketing, trade show, training, and education. He asked again for benefits to be provided for the period of June 2012 to September 2013 as he had provided all of the information requested for that time period. (MM 1941)

Mr. Kefalos reported among other things, "Dr. Karnofsky has two 17-year-old sons graduating from high school and she has barely been able to feed them and put gas in the car, her house is falling apart and she is unable to afford help or repairs. One son is suffering from severe depression directly related to the trauma of the complete life style change, and has no health insurance coverage. Dr. Karnofsky is on multiple medications for anxiety, depression, and PTSD related to the accident injuries loss of her job and her horrific problems with MassMutual." (MM 1942) Despite Dr. Karnofsky's obvious financial concerns no further benefits were issued.

Mr. Kefalos also included an APS from Dr. Poletti noting MRI findings of severe spondylosis, probable nerve root compression c5-6, artificial disc replacement c6-7, adjacent segment disease at c5-6 and C7 T1, spasticity in upper extremities and difficulty with fine motor movements, and pain her prognosis was listed as fair to poor ... (MM 1938-39) Rather than refer the file for a medical review or obtain an IME to determine the impact of Dr. Karnofsky's ongoing pain and newly diagnosed psychiatric conditions would have on her employability as an anesthesiologist, MassMutual conducted 33 hours of surveillance over 4 days and found nothing.

MassMutual recommend a vocational review on November 22, 2013 prior to receipt of the updated medical records and, on February 4, 2014 for the first time since the inception of the claim, asked Mr. Christenson to identify: the occupational duties, physical and/or psychological demands and/or work temperaments and appropriateness of any potential rehabilitation services.

The request to conduct a comparison between Dr. Karnofsky's current aesthetic occupation and pain management is evidence that MassMutual was fully aware of the fact that Dr. Karnofsky was not working in her usual and customary occupation. Despite the obvious importance of this analysis in establishing eligibility under the policy, Mr. Christenson was not asked to conduct the comparison, nor was he asked to distinguish between the occupation of anesthesiologist, of a pain management specialist, and Aesthetics. (MM 1950 -52) There was no vocational review done by Mr. Christenson's instead as noted previously MassMutual relied on a review of duties performed by financial consultants Nawrocki & Smith.

Although new medical information was obtained after the vocational referral, there is no indication that the additional information was submitted for consideration. The referral also did not list any of the multiple medications that Dr. Karnofsky was taking or the restrictions and limitations set forth by her treating physicians as is the usual standard.

The November 22 consultation also indicates that Dr. Karnofsky's decision to set up a new business was a choice, and that her level of impairment is unclear. Dr. Karnofsky had explained on numerous occasions throughout the claim that she began to seek alternative careers after recognizing her attempt to continue working within the parameters of her pain and physical limitations was no longer feasible. MassMutual's assertion that Dr. Karnofsky simply made a choice to change careers shows complete disregard for her efforts following the accident in 2007 to continue in her profession as an anesthesiologist.

MassMutual's assertion that the level of impairment is unclear disregards significant objective medical information in support of impairment. It also shows evidence of MassMutual's failure to properly investigate the claim, including the failure to obtain current medical reviews, no peer to peer contacts and no IME/FCE.

MassMutual's failure to obtain an IME is consistent with actions found to be of concern in the 2004 Multi State Market Conduct Examination of the same leading disability insurer. (Line 843-845) Like the California Market Conduct Examination, the purpose of the examination was to determine if claims handling practices were in violation of the NAIC Unfair Method of Competition and Unfair Deceptive Acts and Practices in the Business of Insurance Model AT of 1972 or the Unfair Fair Claims Settlement Practices Model Act (MM 1990)

- **The Examiners found among other things, "An excessive reliance on in-house medical staff to support the denial, termination, or reduction of benefits.**

> [T]he company relied heavily upon the analysis of their in-house medical professionals, and refrained from securing an IME. In many such instances, the companies discounted or disputed the opinions of claimant's attending physicians, but chose not to invoke the requirement that the claimant attend an IME. Where there is conflicting medical evidence, or conflicting medical opinions with respect to a claimant's eligibility for benefits, the companies have the ability to invoke the policy provision and obtain an IME, and should do so. (Market Conduct Examination Report, November 18, 2004, 0007)

MassMutual had undisputed evidence that Dr. Karnofsky was impaired from performing anesthesia due to her ongoing pain, weakness in her hands and triceps, and limited range of motion in her neck; it also had evidence of her use of multiple medications known to potentially impact physical and cognitive function. Despite the recommendation of its in-house physician and claim consultant, MassMutual never obtained an IME.

Rather than conduct a fair, thorough, and objective evaluation of Dr. Karnofsky's claim, MassMutual obtained 4 database searches, including a comprehensive business search, social media search, and pharmacy record search. (MM; 620, 928, 1522, 1597) MassMutual also requested surveillance on three separate occasions (March 2012, June 2013 [MM1874,] and February 2014, [MM 1929]) and observed Dr. Karnofsky for 10 days, most days the majority of the day.

In the absence of an appropriate medical and vocational evaluation, MassMutual denied total disability benefits, and insisted Dr. Karnofsky submit literally thousands of pages of pages of financial documentation, which resulted in Dr. Karnofsky hiring an attorneys at her own expense to assist her, ultimately filing suit in an attempt to obtain total disability benefits under the policy.

- **MassMutual failed to conduct a fair, thorough, and objective evaluation.**

The two most critical elements of an evaluation of total disability in the context of an Own Occupation are a thorough understanding of the occupational duties of the insured, including the physical / cognitive functions necessary to perform them and the nature and extent of the medically-based functional impairment of the insured, and the impact those functional impairment would have on the ability to perform the material and substantial duties.

Despite its obligation to do so, MassMutual never conducted a thorough investigation of the occupational duties of anesthesiologist, and failed to consider Ms. Hutchinson's vocational assessment that had been provided by Dr. Karnofsky's attorney. In addition, MassMutual never obtained further information including such things as the criteria for obtaining and maintaining hospital or surgery center based anesthesia privileges, malpractice coverage, and licensure.

It is commonly understood within the disability insurance industry that physicians must meet certain educational, physical, and ethical requirements, to assure the health and safety of patients as well as minimize any potential liability risks for the entities that employ them. Dr. Karnofsky was following the advice of her physician that she should stop performing anesthesia as she could not safely intubate or mask patients. MassMutual failed to address any of these considerations in its review.

Regarding Dr. Karnofsky's total disability as an anesthesiologist after June of 2012, despite numerous references throughout the file indicating the actual extent of Dr. Karnofsky's impairment is unclear, (July 2011 medical review, May 2012 medical review, November 22 2013 Chief Consultant review 2021) MassMutual did not obtain an IME or FCE or conduct any peer to peer calls with her treating physicians. Dr. Parisi appropriately made the recommendation to obtain and IME (MM 2128), as did MassMutual's chief claim consultant. (MM 751, 1952) MassMutual, however, failed to obtain an IME or FCE, despite its contractual right to request one and failed to provide an explanation for its failure to comply with the Dr. Parisi and chief claim consultant Miles' recommendations.

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motion in her neck; it also had evidence of her use of multiple medications known to potentially impact physical and cognitive function. Despite the recommendation of its in-house physician and claim consultant, MassMutual never obtained an IME and refused to pay any further benefits.

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It is for all of the reasons above that I am of the opinion that MassMutual failed to comply with its duty of good faith and fair dealing in its refusal to pay total disability and its burdensome and unwarranted requests for extensive financial documentation related to Dr. Karnofsky's new occupation.

I understand additional documentation may be provided for review. I therefore reserve the right to modify this opinion.

Mary E. Fuller, MEd

December 4, 2014